ALCATEL-LUCENT (MALAYSIA) SDN BHD A

v.

SOLID INVESTMENTS LTD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA B
ZAINUN ALI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEALS NO: W-02(IM)(NCvC)-731-2011
& W-02(NCvC)-764-2011] C
27 JUNE 2011

CIVIL PROCEDURE: *Accounts - Action for - Whether action used as tool for discovery of information and documents - Whether action abused process of court - Whether plaintiff's claim failed to plead ingredients required to constitute cause of action for taking of accounts - Whether any fiduciary relationship between parties pleaded or proven to create obligation to provide accounts - Whether any contractual relationship between parties existed* D

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The respondent had signed consultancy agreements ('the agreements') with the appellant's main company, Alcatel Standard SA, under which the respondent was supposed to be paid consultancy fees. The obligation to pay the fees under the agreements laid with Alcatel Standard SA and its associated companies in the Group, Alcatel CIT and Alcatel Italia. The respondent also provided consultancy services to the appellant but the latter was not party to the agreements. Nevertheless, because the appellant had rendered the respondent some form of accounts over the nine years of their business relationship, the respondent filed a claim for accounts against the appellant in the High Court asking for details of the value of deliveries the appellant had made to its customers. The purpose of this exercise was for the respondent to compute the amount of consultancy fees Alcatel Standard SA owed it under the agreements. The respondent's claim against the appellant was not premised on the agreements but on an alleged collateral agreement between the parties founded on practice and conduct. Despite the appellant's defence that it was not an accounting party to the respondent; that it had no contractual relationship with the respondent and that the respondent's claim disclosed no reasonable cause of action, the trial judge granted the respondent's application for accounts. The judge held the appellant was an accounting party under common F G H I

law as it was an "associated company" under the agreements and enjoyed the benefits thereunder. The judge also held a collateral agreement based on practice and conduct existed between the appellant and the respondent; that there was a fiduciary relationship between the parties that gave rise to a duty to account and that consideration under the agreements had passed to the appellant. The appellant appealed against the decision to the Court of Appeal.

Held (allowing appeal with costs)

Per Ramly Ali JCA delivering the judgment of the court:

(1) The respondent's claim against the appellant was a misconceived action for discovery of information and documents to enable it to institute proceedings against Alcatel Standard SA, Alcatel CIT and Alcatel Italia under the consultancy agreements for consultancy fees. (para 46)

(2) The taking of accounts should never be used as a tool for discovery. It appeared that the respondent had abused the process of the court by filing the action against the appellant which had the sole effect of discovery of documents. Any documents and information the respondent believed it was entitled to under the consultancy agreements ought to have been sought by way of discovery at the pending arbitration proceedings against Alcatel Standard SA. (paras 32 & 48)

(3) No fiduciary relationship between the appellant and the respondent was established. The respondent had pleaded a purely contractual claim *ie*, the existence of a collateral agreement separate from the consultancy agreements. The trial judge went beyond the pleaded case when he found the appellant was an accounting party because of an alleged fiduciary relationship between the parties when this was neither pleaded nor proven. (paras 10, 19 & 20)

(4) For there to exist a complete cause of action for taking of accounts the respondent had to plead and prove the appellant was liable to pay a certain sum of monies to the respondent and that the appellant was an accounting party to the respondent. The statement of claim did not plead the above requirements. As it had only pleaded a purely contractual claim, the only remedies available to it were either damages or specific damages, both of which were not established. (paras 31 & 33)

(5) No consideration for the alleged collateral agreement was pleaded and no consideration was discernible from the bundle of pleadings. The purported collateral contract was therefore void for want of consideration. The respondent had failed to establish any contractual relationship between itself and the appellant particularly in relation to the provision of accounts. (paras 38 & 43)

(6) There was no justification in the present case to lift the corporate veil and to hold the appellant liable for the obligations imposed on Alcatel Standard SA under the consultancy agreements. The appellant was not even an "associated company" after the consultancy agreements were signed and no case of actual fraud or conduct amounting to fraud in equity was either pleaded or made out. (paras 12 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah memeterai perjanjian khidmat nasihat ('perjanjian') dengan syarikat induk perayu, Alcatel Standard CA, di mana responden berhak dibayar yuran bagi khidmat nasihatnya. Tanggungan untuk membayar yuran adalah terletak ke atas Alcatel Standard CA dan syarikat-syarikat dalam Kumpulan yang bersekutu dengannya, iaitu Alcatel CIT dan Alcatel Italia. Responden juga telah memberi khidmat nasihat kepada perayu walaupun perayu bukanlah pihak kepada perjanjian. Apapun, disebabkan perayu telah memberikan responden butir-butir akaun yang meliputi tempoh sembilan tahun hubungan perniagaan mereka, responden telah memfailkan tuntutan di Mahkamah Tinggi untuk mendapatkan akaun terperinci mengenai nilai penghantaran-penghantaran yang telah dibuat oleh perayu kepada pelanggan-pelanggannya. Permintaan ini perlu bagi membolehkan responden mentaksir jumlah yuran khidmat nasihat yang perlu dibayar oleh Alcatel Standard CA di bawah perjanjian. Tuntutan responden terhadap perayu tidak berasaskan perjanjian, tetapi berdasarkan kepada perjanjian kolateral di antara mereka yang bersandar kepada amalan dan kelakuan mereka. Perayu mengemukakan pembelaan bahawa ia bukan pihak yang bertanggungjawab kepada responden, bahawa ia tidak mempunyai apa-apa hubungan kolateral dengan responden dan bahawa tuntutan responden tidak menyerlahkan suatu kausa tindakan yang munasabah. Namun begitu, hakim bicara telah membenarkan permohonan responden untuk akaun tersebut. Menurut hakim, perayu adalah "an accounting party" di bawah common law kerana ia merupakan sebuah syarikat bersekutu di

bawah perjanjian dan telah menerima manfaat-manfaat perjanjian. Hakim juga memutuskan bahawa berdasarkan kepada amalan dan kelakuan, telah wujud perjanjian kolateral di antara perayu dan responden, bahawa terdapat hubungan fidusiari di antara pihak-pihak yang sekali gus mencetuskan tanggungjawab untuk mengakaun dan bahawa balasan di bawah perjanjian telah pun diterima oleh perayu. Perayu merayu ke Mahkamah Rayuan terhadap keputusan.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Tuntutan responden terhadap perayu adalah satu tuntutan yang salah untuk penzahiran maklumat dan dokumen-dokumen bagi membolehkannya membuat tuntutan terhadap Alcatel Standard CA, Alcatel CIT dan Alcatel Italia di bawah perjanjian khidmat nasihat bagi mendapatkan yuran-yuran khidmat nasihat.

(2) Pengambilan akaun sekali-kali tidak boleh digunakan sebagai alat untuk penzahiran. Responden nampaknya telah menyalahgunakan proses mahkamah dengan memfailkan tindakan terhadap perayu yang kesannya semata-mata bagi mendapatkan dokumen-dokumen. Apa-apa dokumen atau maklumat yang responden merasakan berhak kepadanya di bawah perjanjian khidmat nasihat harus cuba diperolehi melalui penzahiran di prosiding timbang tara terhadap Alcatel Standard SA yang masih berjalan.

(3) Tiada hubungan fidusiari di antara perayu dan responden telah dibuktikan. Responden telah memplid suatu tuntutan yang berbentuk kontraktual sepenuhnya, iaitu kewujudan suatu perjanjian kolateral yang berasingan dari perjanjian khidmat nasihat. Hakim bicara telah melangkah ke luar sempadan kes yang diplidkan apabila beliau mendapati perayu merupakan "an accounting party" disebabkan oleh hubungan fidusiari di antara pihak-pihak sedangkan ini tidak pernah diplidkan ataupun dibuktikan.

(4) Bagi mewujudkan suatu kausa tindakan yang penuh berkaitan pengambilan akaun, responden perlu memplidkan dan membuktikan bahawa perayu bertanggungan untuk membayar jumlah yang tertentu kepada responden dan bahawa perayu adalah "an accounting party" kepada responden. Oleh kerana ia hanya memplidkan suatu tuntutan yang semata-mata

berbentuk kontraktual, satu-satunya remedi yang terbuka bagi responden adalah sama ada ganti rugi ataupun pelaksanaan spesifik di mana kedua-duanya tidak dibuktikan.

(5) Balasan bagi perjanjian kolateral yang didakwa telah tidak diplidkan dan balasan juga tidak terserlah dari ikatan pliding. Kontrak kolateral yang dikatakan itu dengan itu adalah tak sah kerana ketiadaan balasan. Responden gagal membuktikan sebarang hubungan kontraktual di antaranya dengan perayu terutamanya berkaitan dengan peruntukan akaun.

(6) Dalam kes ini tiada justifikasi untuk menyingkap tabir penubuhan dan mengatakan bahawa di bawah perjanjian tersebut perayu bertanggungjawab ke atas obligasi yang dipikul oleh Alcatel Standard SA. Perayu tidak pun merupakan "sebuah syarikat bersekutu" selepas perjanjian khidmat nasihat dimeterai dan tiada kes fraud sebenar atau kelakuan yang menyerlahkan fraud di sisi ekuiti telah diplid atau dibuktikan.

Case(s) referred to:

Adams v. Cape Industries Plc [1990] Ch 433 ***(refd)***

Baboo Janokey Doss v. Damoder Das [1843] Moore Ind App 175 PC ***(refd)***

Bristol and West Building Society v. Mothew [1996] 4 All ER 698 ***(refd)***

Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32 HC ***(refd)***

Indah Water Konsortium Sdn Bhd v. Yong Kon Fatt [2007] 4 CLJ 613 CA ***(refd)***

John Alexander Clubs Pty Ltd v. White City Tennis Club (Matter No. S309/2009) [2010] HCA 19 ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Re Cyril Sharpe [1992] FCA 616 ***(refd)***

Selangor United Rubber Estates Ltd v. Cradock and Others [1965] 1 Ch 896 ***(refd)***

South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC ***(refd)***

Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd [2011] 1 CLJ 491 CA ***(refd)***

TH Mulherin Family Trust v. Quinn Villages [2007] QSC 231 ***(refd)***

Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2006] 1 CLJ 805 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 26
Rules of the High Court 1980, O. 43

Other source(s) referred to:
Bullen, Leake & Jacob, *Precedents of Pleadings,* 13th edn, p 4
Cheong May Fong, *Civil Remedies in Malaysia*, p 390
Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies*, 4th edn, para 25-020, pp 871-875

For the appellant - Elaine Yap (Mohd Ariff Emran with her); M/s Wong & Partners
For the respondent - Renu Zechariah; M/s Rosley Zechariah

[Appeal from High Court, Kuala Lumpur; Suit No: S-22-NCVC-10-2010]

Reported by Ashok Kumar

JUDGMENT

Ramly Ali JCA:

Introduction

[1] The appellant herein was the defendant at the court below and the respondent was the plaintiff there. The appeal before us is against the decision of the learned High Court Judge dated 4 March 2011 allowing the respondent's application for statements of account to be provided by the appellant to the respondent.

[2] The respondent's claim against the appellant is for an account from the appellant based on consultancy agreements entered into between the respondent and one Alcatel Standard SA and other associated companies within the Alcatel Group. The respondent claimed that by virtue of a collateral agreement between the respondent and the appellant, a duty to account arose.

[3] The appellant's defence in brief is:

(a) the appellant was not an accounting party to the respondent but to Alcatel SA;

(b) the appellant was not the beneficiary of the contract and no consideration flowed to the appellant and there was no intention to create legal relations between the respondent and the appellant; and

(c) the respondent's claim had disclosed no reasonable cause of action against the appellant.

Factual Background

[4] The appellant had secured certain projects from Celcom Bhd and Telekom (M) Bhd with regards to a telecommunication network system in Malaysia, wherein the work for the projects would be undertaken and implemented by the appellant with the consultancy services, being provided by the respondent to the appellant.

[5] The respondent entered into defining agreements with the appellant's main company ie, Alcatel-Lucent Trade International AG (also known as Alcatel Standard SA) and other associated companies within the Alcatel Group. The said agreements provide for the mode and manner of payments to be made to the respondent.

[6] The respondent claimed that, over the years since 2000, the appellant rendered some form of accounts to the respondent and the respondent's fees was computed and paid by the appellant in the region of USD 7 million. To the respondent, this was a collateral agreement by practice and conduct between the appellant and the respondent from 2000 until the appellant terminated the respondent's services in 2009 and stopped rendering the accounts as to the deliverables provided, as a result of which the respondent was unable to compute the amount due to them and as a consequence could not get paid for the consultancy services rendered.

[7] The respondent's claim in the court below is therefore only for accounts pursuant to O. 43 of the Rules of the High Court 1980.

[8] The learned High Court Judge in allowing the respondent's application found that such a collateral agreement between the appellant and the respondent have been established and proved by practice, conduct of the parties and documentary evidence. In short, the learned judge had found that the appellant is an accounting party under common law on the ground that the appellant is described as an "associated company" in the consultancy agreements and the benefits of the contract were for

A the appellant and so the court may pierce the corporate veil such that it is not open for the appellant to say they are not a party to the consultancy agreements. The learned judge also found that consideration had passed to the appellant and a fiduciary relationship existed between the appellant and the respondent and
B the fiduciary duty to account arose consequently.

[9] The appellant's grounds of appeal before this court, essentially *inter alia* are as follows:

C (a) no plea or justification to lift the corporate veil;

(b) no plea or justification for fiduciary duty to account;

(c) no contractual relationship established between the appellant and the respondent; and

D (d) no disclosure of value of deliveries to end customer under the consultancy agreements.

Lifting Of The Corporate Veil

E **[10]** The respondent's pleaded case was the existence of a collateral agreement, separate from the consultancy agreements under which it was suing. The learned judge went beyond the pleaded case when he decided to lift the corporate veil to find that the appellant was bound by the consultancy agreements
F (which the appellant was not a party).

[11] It is trite that parties are bound by their pleadings. For the court to lift the corporate veil, the said issue must be specifically pleaded by a litigant. (See: *Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2006] 1 CLJ 805). Therefore, the
G judgment of the learned judge ought to be set aside on this ground alone.

[12] In the present case, there was no justification for lifting of the corporate veil. The appellant was not a party to the
H consultancy agreements. The appellant was not even an "associated company" after the consultancy agreements were signed in 2000 and 2001. It was open for the respondent to take Alcatel Standard SA to arbitration (as provided under the consultancy agreements) to enforce its rights, as it did in fact do.
I Alcatel Standard SA was the contracting party in the consultancy

agreements. It is against this entity that the respondent ought to pursue its claim. There was accordingly no justification for the corporate veil to be lifted and to hold that the appellant was liable for the obligations imposed on Alcatel Standard SA under the consultancy agreements.

[13] It is settled law that the corporate veil of a company should not be lifted lightly as the concept of separate legal entity is a cornerstone of company law in Malaysia. (See: *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109).

[14] The learned judge in his grounds of judgment (at p. 38 of the records of appeal) indicated that the court was prepared to pierce the corporate veil "in the interest of justice to prevent associated companies of Alcatel Group including the defendant (the appellant) from darting in and out with the corporate labyrinth before this court".

[15] In this respect, Professor Gower in his *Principles of Modern Company Law*, 7th edn., under the heading "Interests of Justice" says the followings:

> Although the interests of justice may provide the policy impetus for creating exceptions to the doctrines of separate legal personality and limited liability, as an exception in itself it suffers from the defect of being inherently vague and providing to neither courts nor those engaged in business any clear guidance as to when the normal company law rules should be displaced. Consequently, it is difficult to find cases in which 'the interests of justice' have represented more than simply a way of referring to the grounds identified above in which the veil of incorporation has been pierced.

[16] The Court of Appeal in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355 adopted the above principle. At p. 362, of the report Gopal Sri Ram, JCA stated:

> In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity.

(See also: *Adams v. Cape Industries Plc* [1990] Ch 433).

[17] In another Court of Appeal case, *Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd* [2011] 1 CLJ 491, Abdul Malik Ishak JCA stated:

> You cannot simply raise the veil of incorporation just because you feel that it is in the interest of justice. But if there is fraud, then the veil of incorporation may be lifted. But here, there was no fraud at all.
>
> ...
>
> Even assuming for a moment that TNBT is not in a position to pay for the award, does that mean that the Appellant (TNB) being the holding company has to be liable. We just cannot ignore the rule laid down by the *Salomon*'s case. We just cannot throw out *Salomon*'s case out of the window and pretend that it is not there. We are not prepared to depart from the rule in *Salomon*'s case. We are aware of the speech of Lord Denning MR in *Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners*, *Same v. McGregor (Inspector of Taxes)* [1969] 1 WLR 1241, at p. 1254, CA, [1969] 3 All ER 855, at p. 860, CA, where His Lordship said:
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> The doctrine laid down in *Salomon v. Salomon & Co.* [1897] AC 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind.
>
> We categorically say that those who have chosen the benefits of incorporation must bear the rigours of the rule in *Salomon*'s case. And those who deal with a company should likewise be well aware of the rule in *Salomon*'s case.

[18] Based on the above authorities, we are of the view that this is not an appropriate case for the learned judge to lift the corporate veil and to hold the appellant liable for the obligations imposed on Alcatel Standard SA under the consultancy agreements. There must be evidence either of actual fraud or some conduct amounting to fraud in equity in order to justify lifting the corporate veil. No such case was pleaded or made out in the present matter before us.

Fiduciary Duty To Account

[19] In the statement of claim the respondent had pleaded a purely contractual claim. We are of the view that the learned judge had gone beyond the pleaded case when he made a finding that the appellant was an accounting party because of an alleged fiduciary relationship between the appellant and the respondent when this was neither pleaded nor proven.

[20] We are of the view; that there was no fiduciary relationship between the appellant and the respondent established in the present case. Where a party alleges the breach of duty arising from any given relation, it must be incumbent on him to specify with precision what is the relation from which the duty arises. Pennycuick J in *Selangor United Rubber Estates Ltd v. Cradock and Others* [1965] 1 Ch 896 stated:

> where a Plaintiff alleges that the Defendant is in breach of duty, he ought to specify at the very start the relation under which the duty arises in order that the Defendant may set his course accordingly; and at any rate in very many cases it must be embarrassing to the Defendant to plead to an allegation of breach of duty without having the relation under which the duty arises precisely specified.

[21] A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. The distinguishing obligation of fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary. (See: *Bristol and West Building Society v. Mothew* [1996] 4 All ER 698, the English Court of Appeal).

[22] In the present case, the respondent's pleaded case against the appellant (based on its statement of claim) was based on contract ie, the alleged collateral agreement (separate from the consultancy agreements) by practice and conduct between the appellant and the respondent from 2000 until 2009. Even assuming the said collateral agreement existed (as alleged by the respondent), it is a strong principle of law that in the context of

A contractual relationship, unless specifically provided for in the terms of the contract, no fiduciary obligation is owed by one party to the other. There must be a critical feature that the fiduciary (ie, the appellant in the present case) undertakes or agrees to act for or on behalf of or in the interests of another person (ie, the B respondent in the present case) in the exercise of a power or discretion which will affect the interests of that other person in a legal sense. From this power or discretion comes the duty to exercise it in the interest of the person to whom it is owed. (See: *John Alexander Clubs Pty Ltd v. White City Tennis Club (Matter No. S309/2009)* [2010] HCA 19, High Court of Australia). C

[23] The accepted traditional categories of fiduciary relationship usually arise in matters involving trustee beneficiary, agent – principal, solicitor-client, employee-employer, director – company, D and partners' *inter se* relationships. Unless expressly provided for in an agreement commercial transactions falling outside the accepted traditional categories of fiduciary relationship (as in the present case) often do not give rise to fiduciary duties, because they do not meet the criteria for characterisation as fiduciary in E nature. (See: *John Alexander Clubs – supra*).

[24] In an action based on contract (as in the present case), it is the contractual foundation that is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate F itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be super imposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction. G

[25] In the present case, we find that the allegation of the existence of a contractual relationship between the appellant and the respondent and that the appellant received consideration in the form of benefit of the consultancy agreements (which was H denied), do not make the appellant a fiduciary *vis-à-vis* the respondent. The learned judge should not have found the existence of any fiduciary duty to account between the appellant and the respondent. By doing so, the court had interpreted the terms and conditions contrary to the express terms appearing in I the consultancy agreements.

[26] As stated earlier the respondent's claim against the appellant is purely a contractual claim. The learned judge had instead held that the appellant is liable to the respondent based on a claim for accounts whereas no such cause of action was pleaded by the respondent in the statement of claim.

[27] The remedy of account is personal against the accounting party and does not create any trust or equitable interest in the property. In the present case, the appellant is not an accounting party under the written contract ie, the consultancy agreements. A plaintiff who seeks the remedy of an account must prove that firstly, the defendant is an accounting party and secondly, the plaintiff is entitled to some sum of monies from the defendant. The latter is important as the remedy of account is not for the purpose of discovery. (See: *Civil Remedies in Malaysia* by Cheong May Fong [2007] Sweet & Maxwell Asia – at p. 390).

[28] According to *Meagher, Gummow & Lehane's Equity*: *Doctrines and Remedies*, 4th edn., *Sydney: Lexis Nexis Butterworth's,* 2002, para. 25-020 at pp. 871-875), the availability of an account in equity for a plaintiff relying on a common law right is not so clear. He suggests eight possible categories when such a decree may be granted:

(a) where there were mutual accounts ie, where there were receipts and payments on both sides, not merely receipts and payments on one side;

(b) where the parties stood in a quasi-fiduciary relationship or a relationship of confidence eg, principal and agent relationship;

(c) where the court ordered general administration of a dissolved partnership;

(d) where an account would be too complicated to settle at law;

(e) in the case of legal waste an account would be ordered when the plaintiff also asked for an injunction, waste having already been committed;

(f) in intellectual property cases, such as passing off and infringement of patent or trademark cases;

(g) cases where not to order an account would abort the plaintiff's right; there were cases where the plaintiff would have had a legal right to be paid money from the defendant if only the defendant had not prevented the plaintiff's rights accruing; and

(h) an order for an account will be made against persons who make profits from treasonable activities.

[29] In *Baboo Janokey Doss v. Damoder Das* [1843] Moore Ind App 175, Dr Lushington of the Privy Council ruled:

> Again, it must be remembered that the Decree cannot stand unless it be first clearly proved that the Appellants are, if anything should be found due to the Respondents arising from the acts and dealings of Ramchund, liable to answer that demand; we cannot make a Decree, ordering them to account, without first determining that they are liable to pay if anything be found due.
>
> A Decree for an account is not, as appears to have been assumed, a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a Decree affirming his rights, only leaving it to be inquired into, how much is due to him from the party accounting.

[30] The above ruling was followed by the Federal Court of Australia in *Re Cyril Sharpe* [1992] FCA 616, where Drummond J said:

> The taking of an account is only appropriate once it has been established that the parties involved are in an accounting relationship with each other, that it, only once it has been established that one party is liable to pay to the other anything that is found on the taking of the account, to be due to that other.

(The same principle was adopted by the Supreme Court of Queensland in *TH Mulherin Family Trust v. Quinn Villages* [2007] QSC 231; see also: *Bullen & Leake & Jacob's Precedents of Pleadings* (13th edn.) Sweet & Maxwell [1990] at p. 4).

[31] From the above authorities, for there to exist a complete cause of action for taking of accounts, the respondent has to plead and prove the following:

(a) the appellant (as the defendant) must be liable to pay a certain sum of monies to the respondent (as the plaintiff); and

(b) the appellant (as the defendant) is an accounting party to the respondent (as the plaintiff). A

[32] It is to be noted that the taking of accounts should never be used as a tool for discovery as it is not "a mere direction to inquire and report". B

[33] The respondent's statement of claim in the present case did not plead the above requirements for a cause of action for accounts. As the respondent had only pleaded a purely contractual claim, the only remedies available to it were either damages or specific damages; both of which were not established based on the evidence at trial. C

No Separate Contractual Relationship

[34] The strength of the respondent's claim against the appellant was based on the alleged collateral agreement between the respondent and the appellant by conduct and practice of the appellant in notifying the respondent of the value of all deliveries made to the customers of the appellant ie, Celcom and Telekom; and informing the respondent of the manner of computation of payment of invoices sent by the respondent. It is not in dispute that the claim was not made based on the consultancy agreements themselves. D E

[35] The majority of the consultancy agreements clearly provided that the consultancy fees to be paid to the respondent was not based on the amount of deliverables made by the appellant to its customers. Instead the consultancy fees payable would be based on the amount invoiced by Alcatel Italia or Alcatel CIT to the appellant. Therefore it cannot be said that the appellant had, as pleaded by the respondent, agreed to notify the appellant of the value of deliveries that had been made to the customers of the appellant so as to give effect to the terms appearing in the consultancy agreements. Such an arrangement would clearly not be in line with the express terms of the consultancy agreements that were agreed between the respondent and Alcatel Standard SA. F G H

[36] There is no evidence that the appellant had provided the respondent with the value of deliveries that it had made to its customers throughout the validity period of all, but for the first and second consultancy agreements. In respect of the said two agreements above, it was established in evidence that I

A accounts as required were already rendered and closed *vide* the appellant's letter dated 23 July 2004 to the respondent. Therefore the conduct and practice relied upon by the respondent to prove the existence of the so-called collateral agreement was not consistent with what the respondent set out to prove.

B

[37] Even if there existed an alleged separate collateral agreement (as pleaded by the respondent) the alleged agreement did not amount to a valid contract enforceable under the law as no consideration passed from the respondent to the appellant based C on the requirement of s. 26 of the Contracts Act 1950.

[38] As the statement of claim stood, no consideration for the agreement was pleaded and no consideration could be discerned from the bundle of pleadings. The purported collateral contract is therefore void for want of consideration. (See: *South East Asia* D *Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 - Supreme Court).

[39] In all the consultancy agreements between the respondents and Alcatel Standard SA, there existed what is termed as "the E entire agreement clause" to the effect that "This agreement constitutes the entire agreement between the parties as to the subject matter hereof, it sets forth all intended rights and obligations and supersedes any and all previous agreements and understandings between the parties with respect to the subject F matter hereof".

[40] The subject matter of the respondent's claim against the appellant ultimately related to the payment of consultancy fees to be paid to the respondent by Alcatel Standard SA under the G consultancy agreements between the respondent and Alcatel Standard SA, where the respondent prayed for an order that the appellant (who was not a party to the consultancy agreements) to notify and provide the respondent with the value of deliveries, that the appellant had made to its customers ie, Celcom and H Telekom, for the purpose of computing the amount of consultancy fees to be paid by Alcatel Standard SA to the respondent under the consultancy agreements. It must be noted that the obligation to pay the respondent the consultancy fees under the said consultancy agreements lay with Alcatel Standard SA, Alcatel CIT I and Alcatel Italia and not the appellant.

[41] The effect of "the entire agreement clause" in all the consultancy agreements, is that the respondent (as a party to the consultancy agreements) was bound by the terms of the consultancy agreements with regard to all the matters mentioned in the said agreements, particularly on matters relating to the terms of payments of the consultancy fees and manner in which such payments were to be made. Such 'entire agreement clause', in our judgment does not permit any term to be implied or to import any other considerations not in the contract, including any other collateral agreements with another party (not a party in the consultancy agreements). All matters relating to the payment of consultancy fees to be paid by Alcatel Standard SA and the respondent (both are parties to the consultancy agreements) as well the manner of computation of the fees must be read within the four walls of the consultancy agreements themselves. (See: Court of Appeal's decisions in *Master Strike Sdn Bhd v. Sterling Height Sdn Bhd* [2005] 2 CLJ 596; and *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337).

[42] It is therefore our view that, for a collateral agreement to exist in the legal sense (as alleged by the respondent) it must be implied that it was entered into in consideration of the consultancy agreements being entered into by Alcatel Standard SA with the respondent. In such a case "the entire agreement clause" (as found in all the consultancy agreements) would in fact be a complete answer to any claim as to the existence of any collateral agreement between the appellant and the respondent.

[43] Based on the above considerations, it is our view that the respondent has failed to establish any contractual relationship between the respondent and the appellant particularly in relation to the accounts to be provided by the appellant as requested by the respondent. "When there is no contractual relationship between the parties, there can be no cause of action founded on contract" (per James Foong, JCA in *Indah Water Konsortium Sdn Bhd v. Yong Kon Fatt* [2005] 4 CLJ 613 p. 624; [2007] 5 MLJ 250, at p. 258 – Court of Appeal).

Disclosure Of Value Of Deliveries To Customer

[44] Payment terms on the consultancy fees to be paid to the respondent under the consultancy agreements were not based on value of deliveries to the appellant's customers. In fact the consultancy fees payable to the respondent by Alcatel Standard

SA, Alcatel CIT and Alcatel Italia under all the consultancy agreements were calculated on the amount invoiced either by Alcatel Italia or Alcatel CIT to the appellant (cl. 3.1 of the agreements referred).

[45] The learned judge had found it appropriate that the appellant provide to the respondent copies of all documents proving the value of items delivered by the appellant to its customers (Celcom and Telekom) with regard to the entire project related to the consultancy agreements (para. (b) of the judge's order dated 4 March 2011) when in fact, none of the consultancy agreements required this. The consultancy fees payable did not relate in any way to the amount actually delivered by the appellant to Celcom and Telekom. As such the respondent did not have any valid interest to the said documents at any material time.

[46] The court is also of the view that the respondent's claim against the appellant is a misconceived action for discovery of information and documents to enable it to institute proceedings against Alcatel Standard SA, Alcatel CIT and Alcatel Italia under the consultancy agreements for consultancy fees. Such intention is evident in M/s Rosley Zechariah's letter of demand (on behalf of the respondent) dated 1 September 2010 to the appellant. Under the consultancy agreements, the consultancy fees were due not from the appellant, but from Alcatel Standard SA, Alcatel CIT and Alcatel Italia. The appellant was not a party to any of the consultancy agreements and therefore not liable to make any payments to the respondent for the said consultancy fees. It must also be noted that the terms of payment under the consultancy agreements provided that payment of consultancy fees would only be made once a report of the work done is issued by the respondent to the party making the payment. From all the evidence produced in court by the respondent, all the reports in question were directed to Alcatel CIT, Alcatel Italia and Alcatel Standard SA. All the invoices relating to the consultancy fees were to be issued either in the name of Alcatel CIT or Alcatel Italia pursuant to the terms of the consultancy agreements.

[47] The respondent had also instituted arbitration proceedings solely against Alcatel Standard SA claiming payment of the alleged consultancy fees due from Alcatel Standard SA under ICC Case No. 16291/MLK/ARP in Geneva. No claims for payment were ever issued by the respondent to the appellant under any of the consultancy agreements.

[48] It is trite, that a request for discovery is not itself a cause of action. An order for discovery is a remedy that is only available against someone whom the respondent (as the plaintiff) has a valid cause of action. Therefore, it appears that the respondent had abused the process of the court by filing the present action against the appellant which had the sole effect of discovery of documents. Any documents and information the respondent believes it was entitled to under the terms of the consultancy agreements ought to have been sought by way of discovery at the pending arbitration proceedings in Geneva against Alcatel Standard SA.

Conclusion

[49] Based on the above considerations we are in agreement with the learned counsel for the appellant that the learned High Court Judge had erred, in law as well as in fact, in coming to his decision to allow the application by the respondent for the accounts and documents to be provided by the appellant to the respondent as appeared in the order dated 4 March 2011. We therefore allow this appeal with costs of RM30,000 to the appellant and the deposit ordered to be refunded to the appellant.